IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:

KOSMOS ENERGY LTD. SECURITIES LITIGATION) Consolidated Civil Action No. 3:12-CV-373-B

CLASS CERTIFICATION HEARING
BEFORE THE HONORABLE JANE J. BOYLE
UNITED STATES DISTRICT JUDGE
DECEMBER 11, 2013

A P P E A R A N C E S

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(In open court at 10:21 a.m.)

THE COURT: Good morning. Let's see. For the record, this is Brady v. Kosmos Energy, Limited, et al. Case 3:12-CV-0373. We are here this morning on the plaintiff's motion, lead plaintiff's motion, for class certification, and that's document 119, filed October 3rd this year. I have the response and the reply and all the submissions, and I have reviewed all of those.

So what I would like to do is begin by having -- and let me get my chart here before you start -- you each introduce yourselves, who you are and who you represent, and I'm going to start with Jay Alvarez.

MR. ALVAREZ: Good morning, Your Honor. Jay Alvarez and Julie Kearns of Robbins Geller on behalf of the lead plaintiff.

MR. KENDALL: Joe Kendall, Kendall Law Group on behalf of plaintiff.

THE COURT: And for the defense side, underwriters.

MR. SUSMAN: Steve Susman, Your Honor.

MR. LUTZ: If we are going to start with the underwriters, I am Brian Lutz with the law firm of Gibson Dunn representing the underwriter

defendants.

THE COURT: Thank you.

MR. SUSMAN: Steve Susman, Sussman Godfrey, for Kosmos.

THE COURT: For Kosmos and the individuals.

MR. SUSMAN: And the individuals.

MR. OXFORD: Yes. Terry Oxford; same thing, Your Honor.

THE COURT: Anybody else we need to have introduced before we go any further?

All right. Well, I have read through all of this, and I would like to hear the arguments, I believe you all requested argument. It's interesting as this issue of class certification and these kinds of cases have evolved, with the Amgen case and now the Halliburton case has been sent back up to the Supreme Court, they accepted cert in Judge Lynn's court for the second time. So I'm not sure what all that means for class certification. I think what it means is it's still not entirely clear, especially with the fraud on the market theory and loss causation.

But having said that, I think part of the question here is what the Court can consider in

deciding what seems to be primarily a predominance issue. And I want to hear from you all all of the reasons why you think this is a class. It seems to me that's one of the major issues that the Court has to decide.

I am also interested in the fact that these are 1933 Act claims. So we don't have this issue of reliance and scienter that we have in most of the cases that have come out on certification in these kinds of cases. So I just wonder if there is a crossover, if you all think what they have reasoned out in those cases is the same or similarly applicable in a case like this where you have Section 11, Section 13, and Section 12 cases.

Those are some of my questions. I know that you all have talked about limiting your remarks to 30 minutes, and I appreciate that. I will give you leeway there.

Who is going to go for the plaintiffs?

MR. ALVAREZ: Thank you, Your Honor. Jay Alvarez on behalf of the plaintiffs.

Your Honor, I'm going to try not to say the same things that were in my papers. It's fairly easy here, I think, with respect to class certification and Rule 23(a). Obviously, there are

four requirements the plaintiff would have to prove: Numerosity; commonality; typicality; adequacy. As Your Honor is aware, the parties have stipulated that the first, numerosity and commonality, have been satisfied.

And if you -- to go back -- I'm not going to reiterate, like I said, what's in the papers. But if you look at pages 6 to 9 of the moving papers, it will lay out how we have satisfied those requirements, and the defendants have agreed that we have satisfied those requirements.

With respect to typicality, Your Honor, the third prong, the defendants dispute typicality. But if you look at their opposition papers -- and I'm sure Your Honor read them, because you said you did -- they don't mention typicality. It's void of any -- they don't mention it at all. So I'm -- I would like to see what they have to say with respect to typicality so that I can respond appropriately. But I think that since it's not in there that they have waived any such argument.

And the reasons for typicality are spelled out in our moving papers on pages 9 and 10. Like the commonality requirement, Your Honor, this requirement for typicality is not demanding. The

lead plaintiff and class claims arise from the same events and the same course of conduct.

The defendants' misrepresentations and omissions in the offering documents, which Your Honor held, are actionable. In order to prove that up, we're going to have -- to present the same facts about Kosmos and its oil production operations to prove that the statements in the Registration Statement were false. So it's the same thing; they are all typical. So I will reserve further argument if Your Honor has any questions with respect to that.

But the main attack -- there's two attacks that the defendants bring with respect to not satisfying the requirements of class cert. The first is adequacy. What they say is that the defendants erroneously claimed, though, that the lead plaintiff is totally uninformed and has virtually no knowledge about the case.

In support of this, they rely on a few snippets of Sue Saville's deposition testimony. Sue Saville is the Chairman of the Board for the Nursing Homes and Related Industries' Pension Plan. She was deposed earlier this year.

So here's what they say on page 8 of their

brief. They have four little arguments. The first is, hey, plaintiff had never seen, much less read, the Registration Statement that forms the basis of both plaintiffs' causes of action.

Like Your Honor said, we don't have a Section 11 case. We don't have to prove up reliance, we don't have to prove up knowledge, we don't have to prove up any causation. We don't have to prove up that the plaintiff read the Registration Statement. It's not something that we have to prove. She didn't even have to read it. It's just kind of like, so what?

And then, they go on to say: Plaintiff could not identify any misstatements in the registration statement. Well, it's a 200-page document, Your Honor. And what happened in the deposition -- yes, in the complaint there are references to the Registration Statement to the prospectus.

What do the defendants do when they depose Ms. Saville? They don't mention Registration Statement, they don't mention prospectus when they are asking her. They put this 200-page document in front of her and say, this is the S 180 form.

"Look at this. Have you seen this before?

"No.

"Tell me where the misrepresentations are in this document."

That's all they say. They didn't show her the complaint. They never said, hey -- they never asked her, Ms. Saville, what's this case about? What is the plan alleged in the complaint? What did the defendants do wrong? They made a twist not to ask her any of those questions.

THE COURT: Mr. Alvarez, along those lines, I have another question. And that is: At this stage, I don't know that it's entirely clear after the Amgen case what the Court can consider. It's obviously beyond the four corners of the motions and the complaint. But they have warned against using the type of rebuttal evidence that was used in the lower courts in that case as inappropriate at the class certification stage. So I am curious as to what I can consider, and you're talking about what can be considered summary judgment type evidence.

MR. ALVAREZ: No. But see, that -- that's -- what I'm saying is that -- yes, I understand. So it's spelled out in our papers exactly what Your Honor could consider. And I think

they want to make it a very rigorous test and that Your Honor can look at the claims, the defenses, and whatnot.

And it's -- it is appropriate to a certain extent to look at the merits of the case, but not to decide the merits; not to say, hey, the plaintiff is going to win or lose. You can't do that.

So what Your Honor could consider is -- is the merits to the extent that it would show whether or not we met all of the requirements of Rule 23. But with respect to adequacy, I mean, these are -- these are questions -- it's appropriate here. I guess maybe I'm not understanding your question.

THE COURT: No, and I'm probably going beyond the adequacy question. I do have a question about what all I can consider in light of the present state of the case authority. But I know you are talking about adequacy now. So if you want to save the rest of that for the other portion of your argument, that's fine, if you want to focus just on the adequacy component.

MR. ALVAREZ: Yes. If Your Honor has any question, I will be happy to answer that.

With respect to the adequacy, they are not -- they didn't ask her any of those questions.

So here -- and what they are saying is that -- in support of this they say, hey, plaintiff could not -- they cite the Umsted case, where plaintiff could not identify the claims asserted in the complaint or any alleged misrepresentations or omissions. Again, they were asking her about the complaint. They were asking her about the allegations of the complaint. And they went in-depth about who the defendants were, what the defendants did. That's not -- that didn't happen here at all.

What did they do, though? Well, okay, they are going to say the next little point -- so those are the first two little points. The next point they say is that plaintiff did not recognize the names of certain defendants. Right? But it's not -- they make it seem like certain defendants. But Your Honor, there are 23 defendants in this case. And you know what they asked her? They asked her, hey, who is Chris Tong?

I don't know.

What about Christopher Wright?

I don't know.

Those two are board of director members, and they were like the last two individuals listed

as defendants under the board of directors. First you had all of the executives, you listed the 12 board of directors, and those were the last two. So if that's all they got, they are going to base their whole claim that, hey, our client is not adequate because they didn't remember -- she didn't know or remember two names out of 23 defendants? You know what? Let them.

But what they didn't tell Your Honor is that, well, when they did ask her about a defendant, what did she respond?

They asked her: "Hey, who is CitiGroup?

"CitiGroup is one of the underwriters.

"Why are you suing CitiGroup?

"Because they didn't do their due diligence.

"Due diligence for what?

"Due diligence as set forth in the allegations of the complaint."

That's it. They didn't -- they didn't -- so when they asked her about -- specifically about a defendant, she knew what happened and why that particular defendant like CitiGroup was sued. They never asked her about any of the other underwriters and, you know, what their position was and why were

they sued. They never asked her about any of the individual defendants. They never asked her, hey, Ms. Saville, why did the plaintiff sue the CEO, controller? They never asked her anything like that at all. They asked her about those two defendants.

What -- Your Honor, what they do neglect to tell you and what they ignore is that Ms. Saville had knowledge about the case. What did she say? Kosmos commenced oil production in 2010. They put out the prospectus in 2011, I think it was in May, which it was, May 2011. The production problems didn't start coming out to the public until late 2011. That's the basis of this case. Those are the allegations.

What also they didn't tell Your Honor is that she was clearly aware of what the role of the lead plaintiff was. They asked her specifically: Do you understand the concept of a lead plaintiff, what that means for purposes of class action litigation?

Answer: We direct the actions towards the case. We keep informed of all proceedings that are discussed, also, with our legal counsel from the Plan. We want to pursue, to be reimbursed for all of our losses.

It goes on to say in a different portion of the transcript: The Court will determine any recovery. Our wish list would be that we get the full restitution for the whole class.

Again, in another portion of the transcript: The plan had the largest loss, and our members' money is very important to the plan, to the trustees. And it's our due diligence and fiduciary responsibility to pursue any avenue that we can to recoup losses.

Clearly knows what it means to be a lead plaintiff and is ready and able to carry out those responsibilities.

They also neglect to tell you that there was a declaration submitted by Ms. Saville in support of the Motion for Class Cert. And in that declaration, it is absolutely clear that the plan is an appropriate -- is adequate to represent the class.

Because what happens is that it's undisputed; they don't dispute it. You can look at the transcript, you can look at their papers, they don't dispute that the plan is participated in decision-making with respect to litigation matters and supervising outside legal counsel is an

institutional investor committed to --

THE COURT REPORTER: Excuse me. You need to slow down when you are reading.

MR. ALVAREZ: -- is an institutional investor committed to vigorously prosecuting this litigation; has regularly consulted with its lawyers regarding significant developments in this case; has made specific strategic decisions regarding the course of litigation; reviewed court filings; and supervised discovery.

And I will give you just a little example. In this case at the motion to dismiss stage, Your Honor dismissed without prejudice Blackstone and Warburg Pincus. You gave the plaintiff 30 days to seek amendment of those claims.

So what did we do? We called up Ms. Saville and explained to her the pros and cons of doing this; had a discussion with her. She provided input; ultimately decided, then, the plan was not going to go forward with that amendment.

I don't know how more adequate you can be that -- it's not the attorneys that are running the case. She has input, and they can't dispute that. They don't even try to attack that, because they cannot. The record is void of any of that. So it's

clear that the plan is -- is adequate to represent the nonclass members.

The second argument, Your Honor, is, as you alluded to earlier, the issue of predominance. So with respect to this case, when you read all those cases, they always say that the predominant issue for class certification is liability. Right?

Well, that's the predominant issue here. In order to establish liability under Section 11 and 12, the lead plaintiff in the class must prove defendants made untrue statements of material fact in or omitted material facts from the offering documents concerning the oil production at the Jubilee Field.

That's what we have to prove. That's the liability. How are we going to do that? We are going to do that with common proof regarding these misrepresentations and omissions. So its common proof is going to show -- it clearly shows that there's common questions of law and fact --

THE COURT: Okay. But this all gets down to, then, this issue, as I see it -- little bit easier for the plaintiffs in this case because it's not a PSL case, but that issue of materiality, what exactly does that mean? It seems that it gets

interpreted as a reliance element, as well as other elements, but it's materiality. So how is that connected up with this predominance fact?

MR. ALVAREZ: See, that's the whole thing. The materiality is presumed in a Section 11 case; it's presumed in a Section 11 case. So -- and it's common, because if we don't prove up commonality at trial, right, what happens? The case goes away completely. So it's common proof. And that's all we have to show, is that it's predominance; it's not perfection, it's a common question.

And there are common questions here, like the falsity of those statements. Like the Supreme Court in Amgen has said, the falsity or misleading nature of defendants' alleged statements or omissions are common questions that need not be adjudicated before a class is certified.

Another common question -- another common predominating question is whether the underwriter defendants acted as statutory sellers in this action. So there is a host, and it's spelled out in our moving papers, of these common questions.

But what the defendants try to do, despite the issues of commonality, predominance, common questions, what they say is they try to pick away at

it. What they say first is, hey, with respect to a Section 11 case, the defendants -- the plaintiffs have to prove knowledge, and that is absolutely incorrect.

I mean, I don't -- the statute, itself, just a plain reading of the statute, itself, that controls. There is -- we don't have the -- the plaintiffs don't have to prove knowledge. Knowledge could be an affirmative defense, yes, but that's something that the defendants -- for the defendants to prove. It's not something to be decided at class cert, it's something to be decided at summary judgment or at trial.

With respect to the knowledge of -- that knowledge is not an element, here, I will just give you a couple of cases. In re: First Republicbank Securities Litigation, 1989 U.S. District LEXIS 11139, and it's star 22. It's a Northern District of Texas case, knowledge by the purchaser of an alleged misrepresentation or omission is a defense to plaintiff's Section 11 claim. It's not an affirmative element, it's a defense.

In Re: IndyMac Mortgage-Backed Securities Litigation, 2012 U.S. District LEXIS 116586, star 33, defendants ignore the fact that knowledge is an

affirmative defense, not a required element of a Securities Act claim. So it's -- we don't have that burden. It's their burden. It's a defense.

Now, the -- even the cases that the defendants cite, themselves, you have to -- Judge, you have to look at each case individually. In those cases that they cite, there's a couple of things: Either there is affirmative evidence presented by the defendants at class cert that certain investors had knowledge of, if you would, quote, unquote, the fraud, or were somehow involved in it. Okay? You don't have that here. They haven't proved anything. They haven't shown you any evidence whatsoever about any of the investors having knowledge of the misrepresentation or the misstatements in the Registration Statement. None.

They cite a couple of 5th Circuit cases, Sandwich and Castano, to talk more about this knowledge and Section 11 cases. But in Sandwich, what happens? Defendants introduced evidence that class members individually negotiated with insurers re worker's compensation insurance premiums.

Okay. So there are individual issues, so there's not going to be predominance. There is no such evidence here. Castano, what was -- what

happened there? Class members were exposed to nicotine through different products, different amounts of time, a different period. The class members had -- the class members' knowledge about effects of smoking differs. They began smoking for different reasons. There were variations in the state laws.

Yeah, if that situation occurred, yeah, that's something totally different. That's not here. Here, it's a simple case. There's three misstatements that we have alleged in the Registration Statement regarding Kosmos and the oil production. That's it. And there is an IPO; there's nothing else. There's no other state laws implicated at all. There's no evidence that the defendants have submitted regarding the knowledge that any investor may have had.

THE COURT: So how do you define your class? I know you've got it in writing, but give me an idea of how you define your class. And what is it precisely that happened to them? And I understand this fraud on the market theory that you are going to show proximate causation.

MR. ALVAREZ: Right. Well, see, that's the whole thing. We don't have to show -- there's

no implication whatsoever.

THE COURT: Please, go ahead and define your class for me and give me just a step-by-step approach of how it is you are going to get where you need to go to show liability.

MR. ALVAREZ: Okay. I just want to make it clear --

THE COURT: I understand your point.

MR. ALVAREZ: Fraud on the market is not applicable here. It's a Section 11 case. It's not a 10(b) case. So as we have set forth in our motion -- and I think the key point is -- the class period is all persons and entities who purchased or otherwise acquired Kosmos Energy, Limited, common stock issued pursuant to or traceable to Kosmos' initial public offering --

THE COURT: Slow down just a little bit.

MR. ALVAREZ: -- paren, quote, IPO, closed quote, closed paren, registration statement and prospectus that became effective on May 10th, 2011, and who were damaged thereby.

THE COURT: What's our time frame of eligible plaintiffs?

MR. ALVAREZ: That's the other thing. I don't think that there is necessarily a need for any

time frame. Obviously, you begin at the date of the IPO.

THE COURT: Which was?

MR. ALVAREZ: Which was May 10th of 2011.

Now, the end date -- there is really no -- it's not like a 10(b) case where you have to have like an end date, like the truth is revealed. Because when you look at the statute, itself -- and again, you're going back to the plain language. So the plain language of the statute contemplates that even after a year from the IPO. So reliance is presumed up to like one year after the IPO. An investor could even sue under Section 11 in the IPO after that one year. But guess what? He's going to have to prove that he relied on those statements. So the presumption goes up to a year. So theoretically, you could go past that.

But if you're asking for an end date, the defendants' expert, loss causation expert, who it's totally irrelevant here because that's the defense that the defendants could put on at summary judgment or at a trial, he acknowledges, okay, well, we're going to take the date that the first complaint was filed in this case, which would have been January 10th of 2012. And if Your Honor wants an end

date --

THE COURT: I think the point here is, it's got to be a manageable class. It all goes back to the Rule 23(a) and (b) factors. It has to be a manageable class, and it helps along those lines on that factor to know what the time frame is so we will have a better idea. Is it going to go on forever or is it manageable?

MR. ALVAREZ: Then we're fine. The lead plaintiff is fine to have the end date to be on January 10th of 2012, which their expert says that's the date that the first complaint was filed. The reason you pick that date is because, you know, if the first complaint is filed, then there should be -- the investors who purchased afterwards should be on notice of these allegations.

THE COURT: All right. So just let's assume arguendo that that's the time frame. I want you to walk through, then, what you have to show to get to liability. I know it's just not false statements and it's automatic. There's got to be more to this, and I want to have you run through what it is you are going to have to establish to get past the liability issue here.

MR. ALVAREZ: Well, yeah, but for purposes

of class certification, we've just got to make sure that there are predominating -- that there are facts that are common to everybody.

THE COURT: Right. But on the other end of that, which makes this analogy confusing and conflated sometimes, is that we have to be sure that you have models of proof or methods of proof, not the actual proof itself, that will lend themselves to commonality and predominance. And so that's why I ask you, how do you get to the end? How do you get to liability? Maybe you don't have to prove it with evidence. No, you don't, but you are going to have to tell me what your proof is so I know it's predominating and common.

MR. ALVAREZ: It's our position that that's a discussion, yes, we can have down the road with respect to summary judgment or trial.

Right now, all I can tell you is that the same evidence -- see, we're in the discovery stage, so we are getting some documents from the defense, we're building up the case. But right now I can't tell you what the evidence is, but we are going to have to show that the statements alleged in the Registration Statement were material and were false or there were omissions. So all of that evidence

that we can get from the defendants, all documents, all e-mails, you know, testimony from the people that we depose, all of that stuff.

THE COURT: I think I'm maybe not asking you this right. I'm not so much asking you to tell me what is out there in your case that you will prove, but in any case, what's your model of proof here? What are you going to use which makes me convinced that it's not more individualized than it is appropriately centralized in a class action?

MR. ALVAREZ: Maybe I'm confused, Your Honor. Because the model of proof, it's the same -- whatever we are going to prove, it's the same documents, the same testimony, the same --

THE COURT: Showing what?

MR. ALVAREZ: Showing that the defendants made material misstatements regarding the Jubilee Oilfield.

THE COURT: Right.

MR. ALVAREZ: For example, what's alleged in the complaint? They had these daily production reports that were showing that the wells weren't producing as they had projected. And therefore, whenever they said, hey, we're going to make 120,000 barrels of oil a day later on in the year,

that was false. There was no reasonable basis for that.

So that's how we are going to prove it up; those documents, things like that. But it's going to be common for everybody. And if we don't prove that up, we lose. So that's the proof. But if you're talking about proof with respect to like damages, I mean --

THE COURT: No. I'm trying to get an idea of -- because it seemed almost like you are skipping over what you're going to have to show in the general sense in a case like this that would convince me that this is more appropriately a class action as opposed to more individualized cases and that you actually have enough to show that you've got some materiality and that this is a case that deserves class certification.

MR. ALVAREZ: Right. But all those factors are in a 10(b) case maybe, but we don't have to prove -- we don't have to show materiality. We don't have to show reliance. We don't have to show you loss causation.

THE COURT: How is it you get to materiality?

MR. ALVAREZ: It's presumed.

THE COURT: I understand that. But it's an element of a Rule 11, Rule 12, Rule 15, so it's an element. It's not just there, it has to get there somehow. And I analyzed that in depth in the June 24th order as to the elements. So it's not just -- there's more to it than just saying it's --

MR. ALVAREZ: No, no. That's the whole thing. You are right, at a different stage; not for class cert. You can't have the plaintiff prove up the allegations of materiality now. It's presumed right now. We're going to have to prove it up at trial.

THE COURT: All right. You've answered my question on that.

Is there anything else you want to tell me on how it is this case looks as a class case from the liability standpoint -- what does it look like? What is going to happen -- so we can talk a little bit -- I can be a little more clear on how it falls within the Rule 23(b)(3) factors.

MR. ALVAREZ: No, other than it's just common proof, Your Honor. I mean, like I said, the same documents, same testimony, same reports, it's all the same.

THE COURT: To show --

MR. ALVAREZ: To show --

THE COURT: -- that this group of people that are your class, that what happened?

MR. ALVAREZ: No, no. That those statements in the Registration Statement were false and material when made or certain facts were omitted.

THE COURT: But not everyone in the universe is tied into that, so this group of people is tied into that how?

MR. ALVAREZ: Well, they were investors in Kosmos, that's how they are tied in. But again, they don't even have to read the Registration Statement because --

THE COURT: They are investors. That's the point I'm --

MR. ALVAREZ: They are investors, yes.

THE COURT: Investors that invested during this period of time that you have called your class.

MR. ALVAREZ: Correct.

THE COURT: All right.

MR. ALVAREZ: Yes. I mean, it's -- the majority of the investors are going to be those individuals that purchased in the IPO. But there could be other investors that subsequently purchased

from the IPO, and that's allowed under the law as set forth in our briefs.

But it's -- I just want to -- I hope I am answering your questions, because it just -- if we don't prove up any of those elements, it will all fall down.

The only thing that -- with respect to what the defendants are saying, well, they are saying -- the other thing they are talking about predominance is the damages issues, and they are talking about Comcast.

And they are basically saying, hey, under Comcast, you're not showing any measured method of damages that can be applied class-wide, and your damage methodology is not tied to any plaintiff's theory of liability.

Well, Comcast and that BP case that they gave you, those are totally different. Comcast is an antitrust case, very complicated. BP is a 10(b) case with alleged multiple frauds. But if you look at those, what happened in those cases? What happened in Comcast?

Well, the defendants set forth -- the plaintiffs set forth four theories of liability. The Court kicked out three of those theories of

liability. Right? So there was only one left.

What did plaintiff's expert do in that case when he was measuring the damages? Well, he -- his damage model included all four theories of liability. He admitted that he couldn't parse them out. So clearly, yeah, it's not -- your model is not -- doesn't work class-wide and it's not tied to the theories of liability. Right? If his model had only been tied to the one theory of liability, then that's a different story.

We don't have any of those issues here. The statute, the plain reading of the statute says how damages are calculated. And the theory of liability is only one theory regarding those misrepresentations regarding the oil production at Jubilee Field. It's not multiple theories of fraud. That's one, and it's tied to that.

So unlike Comcast, unlike BP, this is a rather straightforward case, and the statute tells you class-wide how to calculate the damages. Like in Constar, the 3rd Circuit case, it says, Section 11 damages are calculated as the difference between purchase price of a security and a price at the time suit was filed or securities sold.

I mean -- so that's -- it applies to

everybody. That's class-wide, and there's only one theory of liability. So those cases have no impact on this case. If it was a 10(b) case, if it was an antitrust case, maybe, but that's not the situation.

THE COURT: What are your best Section 11 cases on these points?

MR. ALVAREZ: Right there, Constar.

THE COURT: Besides that. I'm curious about -- I agree with you that the cases do seem to talk more about other areas, other areas of law, or other kinds of securities fraud. But just if you could tell me, because there are a lot of cases cited in here, what your best class certification cases are under the 33 Act in these sections that would support your position on class certification.

MR. ALVAREZ: You know, Your Honor, it's -- I would direct your attention to Butler v. Sears at 727 F.3d 796, 801, 7th Circuit 2013. And it's a parenthetical. It says: If the issues of liability are genuinely common issues and the damages of individual class members can be readily determined, the fact that damages are not identical across all class members should not preclude certification.

THE COURT: Could I have that case cite

again?

MR. ALVAREZ: It is 727 F.3d 796, 7th Circuit. And it's a case that discusses Comcast and -- discusses Comcast and how Comcast is -- you know, you have to look at it -- at the facts. Again, the facts were different in Comcast because of no class-wide theory of methodology, which we don't have here, and the theory -- the liability theory wasn't tied to that methodology, which we have here.

THE COURT: Okay. Can you give me an idea, just a ballpark in numbers, what you might be talking about as class members? I'm not going to tie you to that, but we have tried to get that.

MR. ALVAREZ: That's hard to say at this stage, but it is clearly like in the hundreds.

THE COURT: Okay. All right. You're a little past your 30 minutes, but I know I asked you some questions, so I will let you add anything you like.

MR. ALVAREZ: The only other thing that I just want to make clear, you know, is how the defendants are saying -- well, they have said it over and over in the brief, and if Your Honor has any questions, maybe we can answer them now or

later.

But with respect to loss causation, their expert report, that is totally irrelevant to class cert. I mean, the cases we have cited in our brief say -- the Supreme Court has said, you don't prove up loss causation at a class certification. And anyway it's all common, right? And Your Honor is well aware of that. And they have the burden, not the plaintiffs, they have the burden to show negative causation. It's not an element, and it's not something the plaintiffs would have to prove.

THE COURT: Right. But I think it can be -- and I'm not saying I think it is right now -- but it can be a valid consideration for the Court on class certification, not as a merits inquiry, but just as the superiority of the class as opposed to individual types of claims when you are talking about how you are going to get into loss causation.

Again, I think a lot of this is conflated with the other --

MR. ALVAREZ: Right.

THE COURT: -- and maybe appropriately so because of the complex nature of this. But I think there is a little bit of that that they can bring up today.

MR. ALVAREZ: With respect to loss causation?

THE COURT: With respect to the predominance and superiority here, when we are talking about down the road, is it appropriately -- because there are damages issues that can derail a class certification, because the damages issues are so separate and individualized. I'm not saying that I see that here, but I am just telling you that I don't think it's completely off limits for the Court to consider some of that.

MR. ALVAREZ: Okay. Yes. But remember, just like what I said before, the way damages are calculated are set forth by statute. And it's class -- it's class-wide. It's been done, I don't know, for many, many years, so. . . with respect to superiority, I just want to say, again, Your Honor, they are contesting that they say. But it's not in their papers, so I don't know what their argument is going to be about superiority. I would submit that they have waived any such argument. They don't make it here.

THE COURT: I will give you a chance to get back up when I have heard from the others.

As far as the defense goes, I'll let you

all tell me -- are the underwriters going to go first or -- Mr. Susman?

MR. SUSMAN: Your Honor, Steve Susman. I'm going to speak on behalf of Kosmos on the issues of predominance and damages. I will limit my remarks to the Section 11 case.

My partner, Mr. Oxford, in and on behalf of Kosmos, will deal with adequacy and class definition. And then Mr. Lutz will conclude speaking on behalf of the underwriters, limiting his remarks, I believe, to the Section 12 claim, which is against the underwriters and has different elements of the Section 11 claim.

Your Honor, before the Supreme Court's decision this year in Comcast, it was generally assumed by the Securities Bar -- and Mr. Alvarez said for years and years that's how the class action bar has done things -- generally assumed that any Section 11 case with an adequate class representative was per se certifiable because individual issues of each class member's knowledge and absence of loss causation were defenses, not elements, of the plaintiff's cause of action.

And that general assumption has caused most plaintiff's lawyers, like Mr. Alvarez, to come

to court and assert they have essentially a statutory right to proceed as a class action, whether or not they can articulate a trial plan when asked by the Court or not.

But -- and while it's generally true of most Section 11 cases, it's not true of this case for the following reasons: First, there is an exception to the general rule, that the patient plan itself admits on page 6 of its reply brief. Quote: Individual knowledge typically predominates only if there is specific evidence in the record that the proposed class representatives and other class members knew different things at the same time, which defendants have not even attempted to introduce, closed quote. That's from their brief.

To the contrary, we did introduce that evidence and we do fall within the exception they recognize. We introduced the declaration of Professor Hubbard. He identified 14 public announcements, both by Kosmos and its three Jubilee Field partners, that contained new news, adverse information about production in the field directly contradicting the three alleged misrepresentations about current and projected production, which this Court has allowed to proceed beyond the pleading

stage. That's from your opinion. You allowed three misrepresentations to proceed to trial.

Now, depending on when a given shareholder investor purchased Kosmos stock, every class member may have read one or more or even all of these public announcements. The Court can take judicial notice, if you know some statistics, that there are 16,383 possible combinations of widespread information produced by this mix of 14 public announcements on the stated dates, each -- according to the professor -- containing something new.

The pension plan has not even attempted to rebut that. And this fact alone brings this case within the exception that the pension plan recognizes and acknowledges in their reply brief. It makes this case much more like the 2nd Circuit's IPO decision that all of the other cases cited by the plan that have certified Section 11 cases over claims of hypothetical differences of knowledge among class members.

In the IPO, the complaint itself alleged that class members were aware of, and in some cases participants in, the practice complained of. And there was other evidence in discovery responses that demonstrated, and I'm quoting the 2nd Circuit,

quote: That the predominance requirement is defeated because common questions of knowledge do not predominate over individual questions, closed quote.

Here, Your Honor, proof of widespread individual knowledge is provided not by the complaint's allegation but by the unanswered declaration of Professor Hubbard. In an effort to avoid the IPO case, the plan cites the decision of a Southern District of New York district court in Public Employees Retirement System of Mississippi.

According to the plan's footnote, that district court decision clarifies what the 2nd Circuit meant in IPO. In fact, Judge Rakoff in that case, distinguished IPO on the basis that -- and I'm quoting him -- quote: Sheer conjecture of class members, must they discover that the reps and warranties at issue in the case were, in fact, false, is insufficient to defeat plaintiff's showing of predominance when there is no admissible evidence to support defendants' assertion.

That's not this case. Because, here, the admissible evidence is Professor Hubbard's unrebutted declaration. He cites, he gives you where to go look and see the 14 public announcements

that relate directly to the Jubilee Field's production.

THE COURT: Mr. Susman, why is it okay for the Court to consider that at this stage, as opposed to a summary judgment stage, this admissible evidence?

MR. SUSMAN: Because it is a declaration; it's unrebutted. I mean, we all had fair warning that you were going to have a hearing without being allowed to call witnesses; they did, too. They didn't ask for some ability to call live witnesses.

THE COURT: I just want to make sure I'm not running afoul of the Supreme Court's --

MR. SUSMAN: You are not. I think he would readily concede that every Court that talks about these cases talks about the declarations of experts, including Judge Ellison's decision last Friday we talked about.

In Ellison's decision, it was interesting. In that case, the plaintiffs had an expert. They didn't rely upon his testimony for class certification, but they had one. They don't even have an expert here. They put nothing forward in response to Professor Hubbard. And they were totally permitted to come forward with an affidavit

from their experts, but they did not.

In the Public Employees Retirement System case, Judge Rakoff's case, the class representative testified that it lacked knowledge. And the defendants' own expert testified that he was not aware that the plaintiff's money managers knew of the false statements. And despite an extensive literature search, he found nothing about false statements in connection with the offerings at issue. Again, that's the case that relies on the testimony of the experts.

Here, Professor Hubbard, in an admissible declaration, opined that the 14 news announcements were widespread enough; that, as an economist, he expected each to have an effect on the price if the information were deemed materially adverse.

The other pre-Comcast case that the plan relies upon to get around the IPO decision is a case called IndyMac Mortgage, a Southern District of New York case, which he referred to, Mr. Alvarez just referred to.

In that case, Judge Kaplan started with the proposition -- and I'm quoting -- quote: In determining whether the predominance requirement has been met, courts must consider both affirmative

claims and potential defenses. That's a Section 11 case. Judge Kaplan, who is a very scholarly Southern District judge, acknowledges right up front that you don't just ignore affirmative defenses.

He then, in that case, reviewed news articles and complaints filed in other courts discussing the mortgage-backed securities and housing market generally and even some that mentioned IndyMac Bank specifically. But he found that the only articles mentioned in the bank did not discuss any other facts that were the basis of the Section 11 complaint.

Now, Your Honor can go look at the citations that Professor Hubbard found, the 14 instances, and they are talking about the same production from the same field that they claim was misrepresented. This is an unusual case, because there were four partners in that field. Each of them are making statements publicly about production. And we don't know, obviously, which class members had exposure, actual exposure, to any combination of the pronouncements of the bad news by one or all of those four partners.

In any event, the IndyMac case, because of the way Judge Kaplan described his review of the

evidence, is entirely different from the 14 news announcements that identified Professor Hubbard.

It is also, in the absence of any evidence, makes it impossible for this Court to conclude, as Judge Kaplan did, that, quote, the record before it does not contain enough evidence that any prospective class members or member likely knew or had notice of the alleged misstatements or omissions in the offering documents. The unrebutted declaration of Professor Hubbard, you can't reach that conclusion. In fact, you could conclude the opposite, that it was likely that they knew about one or more of these announcements.

The second reason why this Court should not certify this post-Comcast Section 11 case is that the pension plan utterly fails to present any proof that damages can be calculated on a class-wide basis so that individual issues, in calculating damages, will not predominate. That, after all, is the ultimate requirement of Rule 23.

And look at the last paragraph of Professor Hubbard's unrebutted declaration. He says, quote: I have seen no evidence of any statistically sound methodology that could demonstrate class-wide damages arising from the

allegations in the complaint, closed quote.

Now, they can't, in light of that unrebutted expert statement, fall back on the statutory formula for calculating damages and fail to introduce -- they have no evidence before you on this issue of damages or knowledge. All they have is, well, we are presumed -- we are presumed to have damages.

All I'm saying is, post-Comcast, regardless of the cases before Comcast, plaintiffs' lawyers can no longer come into court and rely on just that assertion that, oh, well, there is a formula so we don't have to tell you how we prove damages. Or, because knowledge is an affirmative defense, I don't have to explain to you how we are going to handle in trial the efforts of what happens when the defense lawyer begins showing every witness that they call one of these 14 announcements and begins asking, did you see this, what did you know about this? You know, the jury is going to -- I mean, it's going to be -- individual issues are going to totally predominate, and they are not going to be relegated to the common issues.

Dr. Hubbard testified in his affidavit that there are 17 days, 17 separate days on which

new news about the Jubilee Field was disclosed, between the effective date with a class period when the IPO became effective, that was the May date, and the date the complaint was filed, presumably, he says, the end of the class period.

The factors affecting the price of stock purchased and sold during each of these 16 periods of time -- there are 16 separate time periods in this period from May to January, in between these new news events. He has to -- what Professor Hubbard did is, he looked at the prices during each of these -- how the prices reacted to each of these new news events. He applied a regression analysis to remove other factors and to determine whether there was any impact.

The plan here responds that his use of an event study -- that's what he calls it, an event study -- to show no damages to a class proves that such a study can be used to prove damages on a class-wide basis.

That is similar to the argument made by the plaintiffs in the BP case that Judge Ellison reviews to certify the plan. There, only the defendants' expert had prepared an event study, and defendants were using their own expert study to

demonstrate the preponderance of individual issues. There, at least, the plaintiffs had their own expert. But the Court said he failed to explain how he would conduct an event study that would prove damages on a class-wide basis.

Here, the plaintiff hasn't bothered to submit anything from its own expert. And looking at the number of times Professor Hubbard had to make a regression calculation suggests that combinations are so many that individual issues will clearly predominate.

According to the plaintiff, Comcast did change nothing, and it is entitled to have its Section 11 claims certified without introducing any knowledge as to how -- any evidence as to how knowledge or damages could be dealt with on a class-wide basis. No case, post-Comcast, including Butler, stands for that in-your-face proposition.

Let me now turn to the main case on which the plan relies, the Constar case. The defendants in Constar did not claim that the knowledge of individual class members was an individual issue. Instead they argued that loss causation was an individual issue. The 3rd Circuit noted, as we concede, that loss causation is an affirmative

defense. That's why it's called negative causation in the Section 11 context.

It went on to note that, in most cases, loss causation or negative causation would not defeat predominance because, quote, any affirmative defense on this ground would present a common issue, not an individual issue. If something other than the alleged misrepresentations produce a drop in stock price, be it the weather, market conditions, or any other factor, class members would be affected uniformly. If, for example, Investors X, Y, and Z all purchased Security A, and Security A's price happens to fall dramatically in the ensuing months, the cause of that decline would not differ as to each investor, closed quote.

The assumption made by the Court in the Constar case, in that example, is that all investors purchase and sell at the same time; therefore, subjecting them all to the same events.

Here the events, which affect both prices, are potential announcements. There are 14 of them that occurred at 14 different times. These announcements would have an effect on some class members, but not on others. Some may have purchased after the announcement. Some may have purchased

before the announcement. The combinations are mind-boggling insofar as how these announcements would have affected prices.

So we believe that what makes this case different -- and we are not saying -- he's right, generally; the general rule, knowledge is an affirmative defense. The general rule, loss causation is an affirmative defense -- or the absence of loss causation is an affirmative defense. The general rule is that damages are calculated by use of statutory formula.

But Comcast has said to trial courts, you've got to get beyond generalities. There's no longer an entitlement to class certification. The plaintiff has got to come forward with proof. Yes, indeed, like a mini-trial with evidence, witnesses, experts, that prove that a class -- a case can be actually tried efficiently as a class case.

And here, Your Honor, they have elected not to present such proof, and for that reason the Court should not allow them to proceed under Section 11 case.

THE COURT: Mr. Susman, the arguments you are making, do they go primarily to predominance under 23(a) and (b)?

MR. SUSMAN: I say primarily predominance, but superiority is so closely related to predominance; yes.

Mr. Oxford will deal with the adequacy of the individuals.

THE COURT: Thank you. I would like to take a five-minute break if that's all right. Five minutes.

(Recess taken.)

THE COURT: Mr. Lutz.

MR. OXFORD: I will do this, Your Honor, Terry Oxford.

THE COURT: I'm sorry. Mr. Oxford.

MR. OXFORD: Your Honor, one place I want to begin is, to the extent I heard the plaintiffs argue that there's not a rigorous test or that we made that up somehow, that language comes directly from the Supreme Court's decision in the Walmart case, quoting: Certification is proper only if the trial court is satisfied after a rigorous analysis that the prerequisites of Rule 23(a) have been satisfied. And of course the same thing can be said for 23(b).

I heard the Court also ask the plaintiff several times about what's their plan here, and I

don't believe I ever heard an answer. A plan of proof is something the plaintiff should demonstrate, not prove the issues, but say, I have a plan. Here is my plan on how we are going to prove liability. We did not hear -- at least I didn't hear any answer to the Court's question on that ground.

We have conceded that plaintiff's counsel is adequate, but that's not enough. As the Berger Court in the 5th Circuit said: It is not enough that plaintiff's counsel are competent if the plaintiffs, themselves, almost totally lack familiarity with the facts of the case.

Now, we heard plaintiff's counsel talk about testimony in the deposition on the Registration Statement. He says to hand over a document that was marked as Exhibit 2 -- and I hope the Court has -- we sent over the full deposition, and I hope we attached the exhibits. If we didn't, we will. And Exhibit 2 is a Form S-1/A, as plaintiff's counsel just said.

Your Honor, on Exhibit 2, on the very first page right under where it says S-1/A, quote: General Form Registration Statement for all companies.

So anybody who had looked at the key

document that they base their entire case on would know that this is a Registration Statement. It says it right there. It says it on the second page, too, Form S-1, Registration Statement under the Securities Act of 1933.

What did the plaintiffs say about the Registration Statement? The first -- I'm quoting from page 21, starting on line 20 in the deposition.

"The first question is whether you have ever reviewed this document before.

"I have never seen this document.

"Do you know whether this document is related to the litigation?

"No.

"Do you know whether there's any false statements in this document?

"I don't know what's in this document.

"Can you point me to any false statements in this document?

"No."

That not only fails to demonstrate an understanding of the case, it fails to demonstrate the key -- any familiarity whatsoever with the key document. And Your Honor, we've seen or heard that the plaintiff read the complaint. But I suggest

that is impossible to read the complaint and see the dozens of references to this document and not have any curiosity about what is in the document. If she's never seen the document, I submit she's never seen the complaint.

Oh, one other point, Your Honor. No one, not Ms. Saville or anyone else on behalf of the plaintiffs, has attended -- is in attendance at this hearing today. And that is a factor to be considered, both the Ogden case, which is Judge -- my name is blank now, from Fort Worth -- Terry Means. In Judge Means' decision, the Ogden case, and in Judge Lynn's decision here, in the Northern District, Dallas Division, in the Umsted case, they both mention that the plaintiff did not attend the hearing.

They accuse us of relying on a few isolated out-of-context excerpts from the deposition. I submit none of those excerpts are taken out of context, and we have supplied the Court with the entire deposition, and you can verify that.

The other answer they have on this in the reply brief, they cite -- oh, I skipped one. They say that this is a Section 11 case and the plaintiff need not have read the prospectus even to have a

claim, and that's absolutely true. But we're not talking about the merits here, we're talking about class certification. It's two entirely different inquiries.

Yes, when they get to the merits of the case, they don't have to show that someone read the Registration Statement. So they may or may not have a meritorious claim, but the question is, can this plaintiff be an adequate representative with no knowledge whatsoever of the key document in the case? Not having read the complaint, not having looked at the document, not being able to articulate anything wrong that's in the document, that's the adequacy inquiry here. And to say, well, it's not part of a Section 11 claim has nothing to do with the adequacy inquiry here.

Last, they cite a case called Veeco, but they ignore the two Northern District of Texas cases we have cited to the Court, Ogden and Umsted. Those cases are both right on point.

Veeco is -- I think it's the Southern District of New York -- discusses this issue of adequacy in a single paragraph, not citing any evidence. And in essence, it is one of these presumed adequate cases that are no longer viable

after the cases of Berger in the 5th Circuit, Walmart, and Comcast.

Last, Your Honor, as Mr. Susman said, I want to talk about class definition. I think the Court had some questions about that. And I think the Court mentioned, which is entirely accurate, that the class, as defined, quote, goes on forever. The class, as defined -- and they mention that to the Court -- is: All persons or entities who acquire shares of Kosmos common stock pursuant or traceable to the company's false or misleading registration statement and were damaged thereby. There is no time parameters on that whatsoever.

We know the beginning date, because we know when the prospectus issued. We don't know from this the end date. Under that class definition, someone who buys today is a class member; someone who buys next week is a class member; someone who buys when trial starts is a class member; or when the case is on appeal.

Now, I heard some shuffling on the plaintiff's behalf to say, well, maybe the end date is the date the lawsuit was filed. The lawsuit was first filed on January 10th, 2012. They have amended their petition, they have amended their

class motion. There is no allegation about a temporal limit on the class in any of the paperwork we have seen so far.

Last, Your Honor, we point out a number of ways in our opposition brief why the class is overbroad. If they are ever to get around all of that, based on the current class definition, is to focus on these last four words, "and were damaged thereby." That, Your Honor, is an improper class definition.

To figure out who is in a class, that is which of all these people were damaged, the case has got to be tried. We will not know until the case is tried who is in this class. Meanwhile, if the Court were to certify this class, these members would have to be notified. Who do we notify? There is no way we can figure that out until we finish with trial.

This leads back to Mr. Susman's point, which is, they haven't even proposed a way at this stage that we can identify who has been damaged. And as a result, they haven't identified who is in the class.

So for those reasons, Your Honor, I urge the Court that the motion for class certification should be denied.

THE COURT: Thank you, Mr. Oxford.

Mr. Lutz, for the underwriters.

MR. LUTZ: Thank you, Your Honor. Brian Lutz with Gibson Dunn. I will be very brief, I think, and I don't want to tread on any of the arguments that have already been made. I will just make a couple of points specifically about Section 12 and then just make a couple of comments on the Comcast issue, trying to respond to some of the questions you had raised.

I guess I just wanted to start by responding to something you said at the beginning of the hearing where you commented on the analysis for class certification has evolved, I think is the word that you used.

I thought it was a very apt description of the analysis that must be done. As we all know, there are some very recent Supreme Court cases on the issue of class certification that have really changed the landscape for assessing whether plaintiff has complied with his burden, has met its burden of showing that it actually can prove that the Rule 23 elements have been satisfied.

You look at the Walmart case, which all of us have touched on. You think -- and you look at

what plaintiffs have shown here in their two briefs, in their supporting papers. It seems as if they have been briefing class certification before this evolution, before the Walmart case, before Comcast and other cases.

Comcast of course made clear that plaintiff must affirmatively demonstrate and prove, prove, not allege, but prove its conformance and its compliance with each of the Rule 23 elements, and it must do so by a preponderance of the evidence.

It's plaintiff's burden to come forward with evidence at the class certification stage that has complied with each of the elements of, here, 23(a) and 23(b)(3), plaintiff's burden, preponderance of the evidence.

So your question to Mr. Susman, I believe, and I think to Mr. Alvarez, as well, as to what you could consider, can I consider the Hubbard affidavit? Absolutely you can consider it, and you must consider it respectfully all of the evidence that's before you on class certification, given that it's a preponderance of the evidence standard that's at issue here. Weighing the evidence, have plaintiffs met their burden of doing so, you have to look at all the evidence before you.

So notwithstanding that burden that's unquestionably on the plaintiffs, what have they submitted in their class certification briefing? No documents; no e-mails, that sort of thing; no deposition testimony whatsoever; no admissions from an answer or otherwise; no expert testimony, of course, and no expert report.

What is the evidence they put in? They put in a two-page affidavit from the lead plaintiff here that basically says that she's fit to -- that the lead plaintiff is fit to -- she's basically up to the task. Respectfully, I don't think that is consistent with Rule 23, and I don't think plaintiffs have shown that they have complied with their burden of showing by a preponderance of the evidence that they have satisfied each of the Rule 23 elements.

Let me just say two words on Comcast, and I realize -- I'm not going to re-tread Mr. Susman's very capable argument. I think you have to look under Comcast and generally under damages for two things: Whether the plaintiffs -- again, plaintiff's burden, whether they have shown that a methodology that can -- that damages can be calculated on a class-wide basis, that's one; and

two, that that methodology is linked to the plaintiff's theory of the case. Those are the two things they have to show under Comcast.

So What's the plaintiff's theory of the case, right? Well, Mr. Alvarez says, there are misstatements, we have to show there are misstatements. Well, it's not just that they have to show misstatements. The theory of the case, if you just look at the very short complaint, is that the offering materials predicted a certain level of oil that would be produced and that it didn't disclose certain information that would -- that undermined that statement. But critically -- and that plaintiffs were damages thereby.

How were they damaged? Under the theory of the case, as they say, they were damaged when the nonpublic production problems at Jubilee were -- that were omitted from the Registration Statement, they were revealed causing delays, expenses, revenue losses, and stock of clients. That is the theory of the case.

Alleged misstatements in the offering materials, that's the allegation, but the revelation of the information that was alleged and not disclosed caused damages. That's the theory of the

case. It's the plaintiff's burden, again, to show a methodology that would allow you to conclude that damages can be calculated across the class and tied to the theory of liability.

I'm not going to again re-tread on what the expert report shows. I think it's quite clear that the punchline for the report is the plaintiffs cannot prove damages here because there is no negative and statistically significant loss or decline resulting from the negative information that was disclosed. That's public information.

I mean, if you look at the report, there's information disclosed in June and July, relatively shortly after the IPO, that the production levels is not going to be hit by the time that is set forth in the offering materials; direct information about the allegations in the case that, you know, Professor Hubbard looked at and said, there is no loss associated with this, there are no damages associated with this information.

So respectfully, the only evidence before you on the core damages question, the core theory of damages here, is that there is no damages. There is no evidence from the plaintiffs, as is their burden, to show you that they can calculate damages, that

there's a methodology for calculating class-wide damages, point one under Comcast, that is, point two, tied to the theory of the case.

Let me just touch on Section 12(a), which I will again try to be very brief. Two points: Plaintiffs said -- Mr. Alvarez said several times during his argument, knowledge is an affirmative defense.

Now, we don't contest that generally under Section 11, but there are two claims here at issue, Section 11 and Section 12(a). There is no question that that is not correct for the purposes of Section 12(a)(2). There is no question under the case law that we provided to you that it is plaintiff's burden under Section 12(a)(2) to show a lack of knowledge of the alleged misstatements. That's what they have to prove. It's their burden to show that.

There's no question that's the law. There's no question that the plaintiffs have come forward with zero evidence on that issue at this stage, which, again, it is their burden to show that common issues predominate on this; they have to show you through evidence that they can prove this through common evidence. There is no evidence in

the record.

They made no effort to refute the very recent case law that makes clear that it's both their burden to prove lack of knowledge under 12(a)(2) and that class cannot be certified when the plaintiffs have failed to do so. You can look at the Lehman decision by Judge Kaplan in the Southern District; the Rali Harborview, a decision by Judge Baer, which is affirmed in the Second Circuit. That's our exact point, and the plaintiffs don't respond to that.

Instead what they say is, they say, well, we shouldn't have to bear this evidentiary burden at the class cert stage, because imposing this burden would make it very difficult for a 12(a)(2) class to be certified. Again, that's just not true.

Plaintiffs have to show that the truth was not available to putative class members. As Mr. Susman went through in his argument and as shown in Professor Hubbard's report, there was a lot of information available to class members during the putative class period that would make different investors in Kosmos stock aware of information relating to the misstatements.

It's plaintiff's burden to show that that

information that we have put out there, that we have put in Professor Hubbard's report, would not provide the relevant knowledge to investigate. It's their burden to do so; they haven't done it.

Just because it's hard to do something, just because it's hard to show something on class certification or through evidence doesn't mean they are excused from doing so.

We respectfully submit that under Lehman and under Rali Harborview, the class cannot be certified, a 12(b)(2) class cannot be certified. It's their burden, and they haven't come forward with the evidence.

And I will just make one very quick last point. Another element of 12(a)(2) is that the plaintiffs must purchase the shares, Kosmos shares, directly from what's called a statutory seller. There is nobody who is actually selling the shares pursuant to the prospectus that's at issue.

Again, there is no evidence in the record, whatsoever, that this is a common question. And, indeed, when you think about it, just, in particular, this is an individualized inquiry as to what did each plaintiff, did each member of the putative class, which appears to be a moving target

as of today, but did each member of the putative class in fact purchase directly from what's called a statutory seller.

Again, we respectfully submit zero evidence on that and cannot certify a Section 12(a)(2) class on that basis.

THE COURT: Mr. Alvarez, I will give you a little bit of time. You all have covered so much in your briefing, but I know you want to get up here and say a few things. So go ahead.

MR. ALVAREZ: I will take as much time as you give me, Your Honor.

Let's talk just briefly about the 12(a)(2) claims of the underwriters. So Mr. Lutz is saying, well, we have -- there's no doubt, yes, that knowledge is an element that we have to prove, but it's an element. It's something that, yes, we have to prove, and we are going to prove it up summary judgment or --

THE COURT: Under the 12 claims.

MR. ALVAREZ: Under the 12(a)(2)), that's right, but we are going to prove it up. It's the same thing. How are we going to prove it up? I want to just make it clear, they keep coming up here and saying, there's no documents, there's no

deposition testimony, there's no this or that. We just started discovery. There has been one deposition. They have produced, I don't know how many documents. You can tell the Court how many documents you produced. It's at the early stage. We're not having any of that. But all I can tell you is we are going to prove up our theory of liability, our case, in the common fashion, using the same things, because it only applies to those misrepresentations.

With respect to the 12(a)(2) claim, it doesn't change at all. At trial we're going to prove up that the defendants concealed this information from those people who bought from the underwriters at the IPO.

If we cannot prove that up, if we cannot, Your Honor can kick the case at summary judgment, the jury can kick case at trial, but it's common.

You talked about conflating issues. They all got up here -- they all conflate the issues. They are conflating the class certification requirements with summary judgment, with trial. That's their best defense in this case.

They talk about, oh, we don't -- there's no evidence about damages being class-wide. This --

the statute is the evidence about how to calculate the damages. It says there, Congress wrote this -- this is how you calculate the damages. It's for everybody. This is the evidence.

Mr. Oxford gets up here and says, oh, you know, Mr. Alvarez is wrong about that.

The rigorous requirements of class certification. Well, let's just read the whole thing. Okay? Amgen, Supreme Court. I'm going to read verbatim without the cites in it: Although we have cautioned that a court's class certification analysis must be rigorous and may entail some overlap with the merits of the plaintiff's underlying claim -- citing Walmart -- Rule 23 grants courts no license to engage in free-ranging merits inquiries at the class certification stage.

That's what they want you to do here. You can't do that. That's what the law says.

THE COURT: So how do you answer the question about the preponderance of the evidence?

MR. ALVAREZ: It's -- Your Honor, that's -- that's what I'm -- I don't want to --

THE COURT: You keep saying it's in the statute, but there's got -- is that your answer? What is your answer to --

MR. ALVAREZ: With respect to damages? Yes.

THE COURT: With regard to the preponderance of the evidence on the factors that the Court needs to consider in deciding class cert.

MR. ALVAREZ: Right. We've gone through that. But with respect --

THE COURT: I didn't know if you had a different -- anything else --

MR. ALVAREZ: No. The only issues here for you to decide -- because really it's the main issues, and you have heard them over and over again -- are the accuracy of the plan to represent the absent class members and predominance issues.

And there's only two subcategories under that: Knowledge, that they're saying that we have -- that Section 11 -- we have to prove up knowledge. But that's -- you can read all of the cases we have cited.

The IPO case that the defendants cite, that case says that the plaintiffs have the burden to prove knowledge with respect to Section 11. And that's -- look at all of the other cases. That's the only case I've ever seen where it's an affirmative element. It is a defense. Like they

said, it is a defense. So if that's what they are relying on -- look at that case. Read it carefully. But that has -- it's very particular, it's very specific. There was evidence about knowledge. Okay?

So -- and I don't want to get off track. But with respect for Mr. Oxford, he's talking about the adequacy of the client. So the document, this Registration -- if I may borrow it, this Registration Statement. Yeah, so if that's what he wants you to do, he wants you to rely on this, hey, if the plan representative, Ms. Saville -- you know, it says -- it says what it says. But look, a 200-page document. What they do is they show it to her. They conceded. She doesn't have to have read this. She doesn't have to have relied on it. But, oh, point to me where the misrepresentations are in this 200-page document. If that's all they got, I will take that.

And then -- but here's the telling thing. And then he says, oh, well, you know what? I find it hard to believe that she said that she has read the complaint and has provided input, but she can't point out anything in this operative document.

So he says, I submit never -- she's never

seen the complaint, then. What are we going to do, believe Mr. Oxford? Are we going to put him under oath? Who is under oath? The only person under oath was the lead plaintiff. She testified she read the complaint and that she had input in it. That's the evidence. It's not Mr. Oxford's, oh, Judge, take Mr. Oxford's word for it.

THE COURT: Let's do this. Let's not talk any more about what the defense said. I want you to say, in bullet points, what it is that you have to establish the elements that are at issue under Rule 23(a) and (b), why they are there in your view, because it is your burden.

MR. ALVAREZ: Correct.

THE COURT: What you got?

MR. ALVAREZ: So what we got -- so numerosity, commonality; stipulated. Okay? Adequacy; it's laid out. I have already said she knows what it means to be a lead plaintiff. It's unrebutted in her declaration. She gets these reports, she provides input, she read the complaint, provided input, talked to us about whether she wanted to amend the complaint with respect to Blackstone and Warburg Pincus. She knows how much the plaintiff has been damaged. She's supervised

discovery. She has -- she receives all the papers that are filed. I can go on and on.

Look at the cases that they cite. Look at the Ogden case that they cited. That's a laundry list of the defense, that the plaintiff doesn't know anything.

THE COURT: Let's get to the other elements, predominance and superiority, what have you shown me?

MR. ALVAREZ: Okay. Predominance. That -- in this case, it's laid out in our papers. But to rebut what they have said, knowledge is not an element for Section 11. Okay? So forget about that. It is an affirmative defense. It's for them to prove at a different stage; not here, not now. Okay?

Then with respect to -- okay. It's going to take a little bit of time, but with respect to like Mr. Susman and Mr. Hubbard, so they are saying -- and the one thing that has come up, Mr. Susman wants to have a mini-trial. You can't have a mini-trial on class certification.

THE COURT: I am still looking at your bullet points here, not Mr. Susman.

MR. ALVAREZ: Okay. My bullet points are,

we don't, for a Section 11 case, have to prove up any knowledge. Okay? It's a burden for them.

The way that they are using Mr. Hubbard in this -- they are just trying to make it more complicated than what it is, Your Honor. Because, as is quite clear and as we have discussed verbatim, the Supreme Court, the 5th Circuit and other courts, have held that loss causation are common questions that may not be adjudicated before a class is certified, Amgen, Halliburton, and Dynegy. The defendants have not cited, and the Court has not found any case that has relied upon a negative causation defense to limit a putative class at the class certification stage. Constar. Okay?

If you look at this -- and they're saying, well, you know, plaintiffs didn't -- they had Mr. Hubbard's report. They didn't respond to it. But his assignment, examine relevant issues related to loss causation and damages subject to plaintiff's claims. In order to calculate these damages, I have done an event study. What he's doing is an event study. He's looking at those 14 disclosures or what they were talking about.

But, see, this is a loss causation argument, not for class cert. The Supreme Court

says, you can't do this. That's why they are conflating the two things. Yeah, they have a good point, maybe, at summary judgment. And if Your Honor finds that we didn't prove -- or they prove up their negative loss causation and we can't rebut that, or he says, oh -- or Your Honor wants -- or if the proof later on comes out that we can't prove that up and you want to decertify the class on their motion, that's fine.

They are doing what the Supreme Court says not to do. There is no evidence that any of the class members read any of these 14 announcements. It's fair game, like I said, for a motion for summary judgment or to decertify the class, but not here.

The Supreme Court said we didn't -- we didn't bring an expert. It's not a 10(b)(5) case. We don't need to show loss causation. And that's all that is, and that's why they are conflating those two issues.

THE COURT: Go ahead and just wrap it up, if you will.

MR. ALVAREZ: I mean, other than -- I would just submit that -- and I know Your Honor is going to do this. But when you look at the cases

that are cited by both parties, there's a big distinction between the Section 11 cases, because there's a lot of things that we don't have to prove up. And the 10(b)(5) cases, if this was a 10(b)(5) case, then, yes, maybe some of the issues they are talking about would come into play, but they don't.

And the statute speaks of the damages on a class-wide basis, and it's tied to one -- one theory of liability. They made these misstatements, and people, you know, bought the stock based on those misstatements.

And with respect to -- the last thing is that if you -- we would submit -- I mean, we don't have to make an amendment of what the class is. We're asking, now, in your order, to certify a class, same language, but starting on the day of the IPO, which is the same date, ending, like they said, on the date that their expert said of when the first complaint was filed, January 10th, 2012. So your order could just say that, and that's it.

Thank you, Your Honor.

THE COURT: Thank you all very much. We will adjourn. I will get this read inside and out, all the new cases, all the other cases, and we will get it figured out hopefully as soon as possible.

Thanks for the argument. Nice to see you all. Court will be in recess.

(Court in recess at 12 noon.)

C E R T I F I C A T E

I, Shawnie Archuleta, CCR/CRR, certify that the foregoing is a transcript from the record of the proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

This 20th day of December 2013.

s/Shawnie Archuleta
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